COURT OF APPEALS
DECISION
DATED AND RELEASED

April 17, 1997

NOTICE

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 96-0374

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DAVID L. CANEDY,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Rock County: J. RICHARD LONG, Judge. *Affirmed.*

Before Eich, C.J., Dykman, P.J., and Vergeront, J.

PER CURIAM. David Canedy appeals from an order denying him relief on a § 974.06, STATS., motion, in which he sought postconviction relief from an arson conviction. We also conclude that relief is unavailable, and therefore affirm.

Canedy's conviction occurred in 1989. At his trial, the State presented testimony from police officers concerning inconsistent statements Canedy made while in custody. At one point, he admitted purchasing gasoline from a Superamerica shortly before the fire. Later, he denied doing so. The trial court denied postconviction relief, and we affirmed, on appeal, in 1990. ***State v. Canedy***, No. 90-0308-CR, slip op. (Wis. Ct. App. Dec. 13, 1990). In our decision, we characterized the evidence against Canedy as follows:

> Several witnesses testified that Canedy was at the Lowery residence, behaving in what the jury could have found to be a suspicious manner. A fireman testified that Canedy was trying to leave the scene, rapidly spinning his car wheels in order to dislodge the car from some ice. There was an odor of gasoline about him, and lab tests indicated that there was gasoline on Canedy's clothing. He attempted to explain all this by saying that he poured gasoline in his car tank and in the carburetor, attempting to start the car. However, there was no gasoline spill in the area of the car, the car's gasoline tank was inaccessible, having been wired shut, and an unbroken layer of snow indicated that the car's hood had not recently been opened.
>
> In addition Canedy made contradictory statements regarding where he got the gasoline, at first saying that he went to a nearby gasoline station and later denying doing so. There also was evidence from which the jury could have inferred motive. Canedy and his wife were having marital difficulties and, as we have noted, she had recently moved her furniture to her mother's garage. Finally, Canedy was "combative," "rather excited," and unwilling to cooperate in the arson investigation.

Id. at 4-5.

Canedy commenced this § 974.06, STATS., proceeding in 1991, alleging ineffective assistance of trial counsel. At the hearings on his motion, he introduced evidence that the inconsistent statements he gave to the police would have been held inadmissible on Fifth Amendment grounds, had counsel moved to suppress them. In 1993, the trial court denied relief on the grounds that this and

all other issues raised in the motion could have been raised in Canedy's initial postconviction motion. On appeal, we reversed that decision, holding that the trial court erred by failing to offer Canedy an opportunity to explain why he did not earlier raise the ineffectiveness issue. ***State v. Canedy***, No. 93-2987, unpublished slip op. at 3 (Wis. Ct. App. July 27, 1995). We ordered that the trial court, on remand, "shall provide that opportunity and shall then determine whether Canedy's reasons are sufficient to allow the motion. If they are, then the trial court must decide the motion on its merits." ***Id***.

On remand, Canedy offered testimony regarding the ineffectiveness of postconviction counsel during the postconviction trial court proceeding, to explain why he did not raise the ineffective trial counsel issue until after the conclusion of his initial postconviction proceeding. The trial court held that the ineffectiveness of postconviction counsel under these circumstances was not a matter to be presented to or decided by the trial court. The court concluded that under ***State v. Knight***, 168 Wis.2d 509, 520, 484 N.W.2d 540, 544 (1992), a criminal defendant my only raise postconviction counsel's effectiveness by petition for a writ of habeas corpus to the court which heard the appeal. However, the trial court also reached the merits of the ineffective trial counsel claim, and concluded that trial counsel did not ineffectively represent Canedy. The present appeal is taken from that ruling.

The trial court erred by concluding that it had no authority to decide postconviction counsel's ineffectiveness. In ***State ex rel. Rothering v. McCaughtry***, 205 Wis.2d 668, 674, 556 N.W.2d 136, 139 (Ct. App. 1996), we held that a claim of alleged ineffective assistance of postconviction counsel in a trial court postconviction proceeding should be raised in the trial court, and can be raised either by petition for habeas corpus or by a § 974.06, STATS., motion. In so

ruling, we distinguished between postconviction counsel and appellate counsel, and held that a ***Knight*** proceeding applied only to the latter's acts or omissions during the appeal, and not to the former's representation during the trial court postconviction proceeding. ***Id.*** at 671-72, 556 N.W.2d at 138. The issue was therefore properly raised and presented in the trial court.

The issue of appellate counsel's ineffectiveness has no bearing, however, because Canedy did not prove trial counsel's ineffectiveness. Prejudice is a necessary component of an ineffectiveness claim. ***State v. Pitsch***, 124 Wis.2d 628, 633, 369 N.W.2d 711, 714 (1985). Here, had counsel successfully suppressed the police officer's testimony, the State could have presented another witness to Canedy's first inconsistent statement, because he voluntarily admitted to a hospital employee, outside of the interrogation setting, that he had purchased gasoline at Superamerica. The subsequent statement denying that purchase was not suppressible anyway, as it was a voluntary, noninterrogational statement that a police officer, and others, overheard. Additionally, as described in our decision on Canedy's first appeal, there was substantial other evidence of guilt. The test for prejudice is whether there is a reasonable probability that but for counsel's error or omission the result of the proceeding would have been different. ***Id.*** at 642, 369 N.W.2d at 719. Even without the inconsistent statements that undermined Canedy's credibility, there was no reasonable probability of a different result.

By the Court.—Order affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.